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Public Prosecutor v Tan Eng Boon

B HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-44–61–04 OF 2019
MOHD NAZLAN J
4 SEPTEMBER 2019

C *Criminal Procedure — Joint trial — Prosecution applied for joint trial — Whether two accused ought to have been jointly charged to justify a joint trial — Whether charges and two accused should be jointly tried — Whether requirement of different charges relateing to the same underlying transaction met — Whether a joint trial would prejudice respondent — Criminal Procedure* D *Code s 170*

This was an application filed by the prosecution for a joint trial of the cases registered as Criminal Trial No WA-45–10–03 of 2019 against the respondent and Criminal Trial No WA-45-03–01 of 2019 involving another accused E person, Tengku Adnan bin Tengku Mansor ('Tengku Adnan'). On 15 November 2018, the respondent was charged at the Kuala Lumpur Sessions Court for an offence under s 16(b)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and an alternative charge for an offence under s 109 of the Penal Code, read together with s 165 of the Code. F On the same day, Tengku Adnan was charged separately at the Kuala Lumpur Sessions Court under s 16(a)(A) of the MACC Act with an alternative charge under s 165 of the Penal Code. On 14 December 2018, the case against Tengku Adnan was transferred to the High Court on the application of his counsel and was then registered as Criminal Trial No WA-45–3–01 of 2019. That G application was not objected to by the prosecution. On 26 December 2018, the prosecution filed a notice of motion for a transfer of the respondent's case to the High Court pursuant to ss 417(1)(e) and 418 of the Criminal Procedure Code ('the CPC') but the application was later withdrawn on 22 January 2019. The applicant then on 14 February 2019 filed another notice of motion in the H High Court pursuant to ss 417(1)(d), (1)(e), (1)(cc) and 418 of the CPC, to transfer the case against the respondent to the High Court. On 20 March 2019, the High Court allowed that application for transfer of the case against the respondent from the sessions court to the High Court and registered as Criminal Trial No WA-45–10–03 of 2019. Subsequently on 3 April 2019, the I applicant filed a notice of motion in the High Court pursuant to s 170 of the CPC for a joint trial of the cases against the respondent and Tengku Adnan. The thrust of the argument of the applicant for a joint trial was that the charges against the two accused persons showed that the key assertions contained therein, such as the date and place of the alleged offence, the purpose, the

amount involved and mode of payment were all the same. The respondent contested the application on two principal fronts: (a) what the respondent described as a preliminary objection in that before there could be a joint trial, the accusedmust have been jointly charged under s 170 of the CPC, which was not the case here; and (b) a joint trial against the respondent and Tengku Adnan would potentially occasion a prejudice to the respondent. All these, according to the applicant, demonstrate that the charges against the two were in relation to the same transaction, and fulfill the test for a joint trial under s 170 of the CPC.

Held, allowing the application:

(1) The premise of the preliminary objection raised by the respondent was a flawed construction of s 170 of the CPC. Even though it was true that there was no express provision in the CPC for an application for joint trial, it did not mean that if the cases were charged separately, there could not be an order for a joint trial and that separate trials must therefore conducted. It was for the party seeking a joint trial to establish that its case fell within any of the stated exceptions. But the fact that the accused persons were not at the first instance charged together was immaterial to any application for joint trial that might be initiated by the party seeking a joint trial. The argument that there was no statute that conferred jurisdiction to the court to grant the same unless there had been a joint charge preferred against both the respondent and Tengku Adnan was without substance, for it conveniently ignored the true construction of s 170 and the countless joint trials that had taken place despite the accused persons not originally having been jointly charged. The contention of the respondent that a joint trial cannot be ordered because the respondent and Tengku Adnan were not charged together was totally unsustainable, therefore the preliminary issue by the respondent was rejected (see paras 15, 19, 21 & 26).

(2) Based on the charges preferred against the respondent and Tengku Adnan, it was quite clear that the facts underlying the transaction subject to the charges were the same. The test as established by case law authorities on the requirement of the presence of a same transaction, namely concerning proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design given the above-stated factual considerations, had more than clearly been made out. It certainly could not be doubted that based on the charges — of one accused being charged for giving a bribe and another being alleged to have received that same bribe was overwhelmingly indicative of the presence of a unity of purpose and design. The requirement that the different charges must relate to the same underlying transaction pursuant to s 170 of the CPC in order to justify a joint trial had been satisfactorily shown by the applicant to have been fulfilled (see paras 32, 34 & 36–37).

(3) Although the concerns raised by the respondent would not arise in a separate trial situation, this was not a sufficient reason to show prejudice to the respondent. In the first place, what was raised by the respondent — the non-compellability of a co-accused as a witness and the inability to cross examine a co-accused who was called to enter defence but chose to remain silent — would be a natural consequence of any joint trial. Although the respondent fashioned the issue of the non-compellability of the co-accused in the context of the defence stage, for completeness, the argument was no less relevant at the prosecution stage. It was because if the accused were separately tried, the prosecution would have to call Tengku Adnan as a material witness to unfold the narrative of its case (see paras 42–43).

[Bahasa Malaysia summary

Ini merupakan permohonan yang difailkan oleh pihak pendakwaan untuk perbicaraan bersama bagi kes-kes yang didaftarkan sebagai Perbicaraan Jenayah No WA-45–10–03 Tahun 2019 terhadap responden dan Perbicaraan Jenayah tertuduh seorang lagi, Tengku Adnan bin Tengku Mansor ('Tengku Adnan'). Pada 15 November 2018, responden telah dituduh di Mahkamah Sesyen Kuala Lumpur untuk kesalahan di bawah s 16(b)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') dan terdapat tuduhan altenatif untuk kesalahan di bawah s 109 Kanun Keseksaan, dibaca bersama s 165 Kanun Keseksaan. Pada hari yang sama, Tengku Adnan telah dituduh secara berasingan di Mahkamah Sesyen Kuala Lumpur di bawah s 16(a)(A) Akta SPRM bersama tuduhan alternatif di bawah s 165 Kanun Keseksaan. Pada 14 Disember 2018, kes terhadap Tengku Adnan telah dipindahkan ke Mahkamah Tinggi atas permohonan peguamnya dan kemudiannya didaftarkan sebagai Perbicaraan Jenayah No WA-45–3–01 Tahun 2019. Permohonan tersebut tidak dibantah oleh pihak pendakwaan. Pada 26 Disember 2019, pihak pendakwaan telah memfailkan satu notice usul untuk memindahkan kes responden ke Mahkamah Tinggi berikutan ss 417(1)(e) dan 418 Kanun Tatacara Jenayah ('Kanun') namun permohonan tersebut telah ditarik balik pada 22 Januari 2019. Pemohon kemudiannya, pada 14 Februari 2019 failkan notis usul yang lain di Mahkamah Tinggi berikutan ss 417(1)(d), (1)(e), (1)(cc) dan 418 Kanun untuk memindahkan kes terhadap responden ke Mahkamah Tinggi. Pada 20 Mac 2019, Mahkamah Tinggi membenarkan permohonan untuk memindahkan kes terhadap responden dari mahkamah sesyen ke Mahkamah Tinggi dan didaftarkan sebagai Perbicaraan Jenayah No WA-45–10–03 Tahun 2019. Kemudiannya, pada 3 April 2019, pemohon telah memfailkan notis usul di Mahkamah Tinggi berikutan s 170 Kanun untuk perbicaraan bersama untuk kes-kes terhadap responden dan Tengku Adnan. Alasan utama untuk permohonan adalah pertuduhan kedua-dua tertuduh menunjukkan bahawa penuntutan utama yang terkandung, seperti tarikh dan tempat kesalahan dilakukan, matlamat, jumlah terlibat dan cara pembayaran adalah semuanya sama. Responden

membantah permohonan tersebut atas dua alasan utama; (a) responden telah menyatakan sebagai bantahan awal bahawa sekiranya perbicaraan bersama, tertuduh perlulah dituduh di bawah s 170 Kanun, di mana dia tidak dituduh; dan (b) perbicaraan bersama terhadap responden dan Tengku Adnan boleh berpotensi membuatkan situasi yang prejudis kepada responden. Walaubagaimanapun, menurut pemohon, pembuktian bahawa tuduhan-tuduhan terhadap kedua tertuduh merupakan transaksi yang sama dan memenuhi tuntutan untuk perbicaraan bersama untuk s 170 Kanun.

Diputuskan, membenarkan permohonan:

(1) Di atas sebab bantahan awal oleh responden adalah taksiran yang salah untuk s 170 Kanun. Walaupun tiada peruntukan di dalam Kanun untuk permohonan perbicaraan bersama, ia tidak bermaksud bahawa sekiranya kes-kes di tuduh berasingan, maka arahan untuk perbicaraan bersama tidak boleh dilakukan dan perbicaraan berasingan haruslah dijalankan. Pihak yang memohon perlulah membuktikan kesnya termasuk di bawah pengecualian yang dinyatakan. Namun, berdasarkan fakta yang tertuduh bukanlah kali pertama dituduh bersama adalah tidak penting terhadap permohonan untuk perbicaraan bersama yang dimulakan oleh pihak yang memohon. Hujahan bahawa tiada undang-undang yang memperuntukkan bidang kuasa mahkamah untuk membenarkan perbicaraan bersama melainkan terdapat tuduhan yang sama terhadap responden dan Tengku Adnan adalah tidak berasas, dan telah dengan sengaja tidak mempedulikan taksiran yang sebenar s 170 dan perbicaraan bersama yang tidak terkira yang telah dibenarkan walaupun tertuduh-tertuduh tidak dituduh bersama asalnya. Hujahan responden bahawa perbicaraan bersama tidak boleh diarahkan kerana responden dan Tengku Adnan adalah tidak dituduh bersama adalah tidak diterima, oleh itu, isu awal oleh responden ditolak (lihat perenggan 14, 19, 21 & 26).

(2) Berdasarkan pertuduhan dipilih terhadap responden dan Tengku Adnan, ianya jelas bahawa fakta-fakta berkenaan transaksi yang berkait dengan tuduhan-tuduhan adalah sama. Ujian yang telah diputuskan oleh otoriti kes-kes berkenaan keperluan untuk adanya transaksi yang sama, iaitu berkenaan dengan masa yang dekat, kesesuaian dan tempat yang hampir, keberlangsungan perbuatan dan keberlangsungan matlamat atau cara dengan merujuk fakta di atas, telah dengan jelas dibuktikan. Tidak boleh dinafikan bahawa tuduhan-tuduhan — seorang dituduh menerima rasuah dan seorang lagi pemberi rasuah — merupakan petunjuk yang jelas bahawa terdapat matlamat dan yang sama. Keperluan bahawa tuduhan yang berbeza mestilah dikaitkan dengan transaksi yang sama berikutan s 170 Kanun untuk membenarkan perbicaraan bersama yang telah ditunjukkan dengan memuaskan oleh pemohon dan telah dibuktikan (lihat perenggan 32, 34 & 36–37).

(3) Walaupun terdapat kerisauan yang diutarakan oleh responden tidak dapat dibangkitkan di dalam situasi perbicaraan yang berasingan, namun ini bukanlah alasan yang kukuh untuk menunjukan prejudis kepada responden. Pada asalnya, apa yang telah dibangkitkan oleh responden, ketidak sesuaian tertuduh yang dituduh bersama sebagai saksi dan ketidakupayaan untuk pemeriksaan balas tertuduh satu lagi yang telah diarahkan untuk masuk pembelaan namun memilih untuk berdiam diri — merupakan akibat yang natural daripada perbicaraan bersama. Walaupun responden berlatarkan isu ketidak sesuaian untuk tertuduh satu lagi di dalam konteks semasa perbelaan, demi kesempurnaan, hujahan itu tidak relevan semasa pertuduhan. Ini adalah kerana sekiranya tertuduh dibicarakan berasingan, pendakwaan akan memanggil Tengku Adnan sebagai saksi penting untuk membuka naratif kes tersebut (perenggan 42–43).]

Cases referred to

AFM Shafiqul Hafiz v PP [2019] 10 MLJ 31, HC (refd)
Amrita Lal Hazra & Ors v Emperor [1915] 42 Cal 957 (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Lim Sing Hiaw v PP [1965] 1 MLJ 85, FC (refd)
PP v Loh Ang Sing [1965] 2 MLJ 129 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC

Legislation referred to

Capital Markets and Services Act 2007 s 198
Criminal Procedure Code ss 51A, 163, 170, 170(1), 417(1)(d), (1)(e), (1)(cc), 418
Evidence Act 1950
Malaysian Anti-Corruption Commission Act 2009 ss 16(a)(A), (b)(A), 62
Penal Code ss 34, 109, 165

Julia bt Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.
Muhammad Faisal bin Moideen (Julian Ch'ng with him) (Moideen & Max) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application filed by the prosecution for a joint trial of the cases registered as Criminal Trial No WA-45–10–03 of 2019 against the respondent and Criminal Trial No WA-45–03–01 of 2019 involving another accused person, Tengku Adnan bin Tengku Mansor.

[2] At the conclusion of the hearing, I allowed the application and highlighted the primary reasons for the same. This judgment contains the full reasons for the decision.

KEY BACKGROUND FACTS

[3] On 15 November 2018, the respondent was charged at the Sessions Court (9) Kuala Lumpur for an offence under s 16(b)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and an alternative charge for an offence under s 109 of the Penal Code, read together with s 165 of the same Code. The case was then registered as Arrest Case No WA-62R-53–11 of 2018. Both the principal and alternative charges against the respondent read as follows:

> Pertuduhan
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> Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putra, Level 2, Podium Block, Pusat Dagangan Dunia Putra, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah memberikan suatu suapan bagi faedah kepada Tengku Adnan bin Tengku Mansor (No K/P: 501220-04-5119), iaitu, wang berjumlah RM1,000,000.00 melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nenas Industries Sdn. Bhd. yang telah didepositkan ke dalam akaun CIMB Bank No akaun 14200008384058 milik beliau, sebagai upah bagi beliau kerana telah melakukan suatu perkara yang sebenar, iaitu, meluluskan permohonan Nucleus Properties Sdn Bhd sekarang dikenali sebagai Paragon City Development Sdn Bhd) untuk menaikkan ratio plot berkaitan dengan pembangunan Lot 228, Jalan Semarak, Kuala Lumpur, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 16(b)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah subseksyen 24(1) Akta yang sama.
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> Pertuduhan Pilihan
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> Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan
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> Pusat Dagangan Dunia Putra, Level 2, Podium Block, Pusat Dagangan Dunia Putra, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dalam perlakuan kesalahan oleh Tengku Adnan bin Tengku Mansor (No K/P: 501220-04-5119), yang sebagai seorang penjawat awam iaitu Menteri Wilayah Persekutuan, telah menerima untuk diri beliau suatu barang berharga dengan tiada balasan, iaitu, wang berjumlah RM1,000,000.00 daripada kamu melalui cek Public bank bernombor 300109 milik syarikat Pekan Nenas Industries Sdn Bhd. Yang telah didepositkan ke dalam akaun CIMB Bank No akaun 14200008384058 milik beliau, yang mana beliau ketahui kamu sebagai seorang Pengarah di syarikat Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) ada perhubungan dengan kerja-kerja rasmi beliau sendiri, yang mana kesalahan tersebut telah dilakukan hasil persubahatan kamu, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 165 Kanun yang sama.

[4] On the same day of 15 November 2018, Tengku Adnan bin Tengku Mansor ('Tengku Adnan') was charged separately at Sessions Court (14) Kuala Lumpur under s 16(a)(A) of the MACC Act with an alternative charge under s 165 of the PC. The case against Tengku Adnan was registered as Arrest Case No WA-61R-24–11 of 2018. The principal and alternative charges read as follows:

> Pertuduhan
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> Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan Pusat Dagangan Dunia Putra, Level 2, Podium Block, Pusat Dagangan Dunia Putra, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima bagi diri kamusuatu suapan, iaitu, wang berjumlah RM1,000,000.00 daripada Tan Eng Boon melalui cek Public Bank bernombor 300109 milik syarikat Pekan Nenas Industries Sdn Bhd yang telah didepositkan ke dalam akaun CIMB Bank No akaun 14200008384058 milik kamu, sebagai upah bagi diri kamu kerana telah melakukan suatu perkara yang sebenar, iaitu, meluluskan permohonan Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) untuk menaikkan ratio plot berkaitan dengan pembangunan Lot 228, Jalan Semarak, Kuala Lumpur, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah subseksyen 24(1) Akta yang sama.
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> Pertuduhan Pilihan Kepada Pertuduhan Pertama
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> Bahawa kamu, pada 27 Disember 2013, di CIMB Bank Berhad, Cawangan
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> Pusat Dagangan Dunia Putra, Level 2, Podium Block, Pusat Dagangan Dunia Putra, Jalan Tun Ismail, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang penjawat awam iaitu Menteri Wilayah Persekutuan, telah menerima untuk diri kamu sendiri suatu barang berharga dengan tiada balasan, iaitu, wang berjumlah RM1,000,000.00 daripada Tan Eng Boon melalui cek Public bank bernombor 300109 milik syarikat Pekan Nenas Industries Sdn. Bhd. Yang telah didepositkan ke dalam akaun CIMB Bank no. akaun 14200008384058 milik kamu, yang mana kamu ketahui Tan Eng Boon sebagai seorang Pengarah di syarikat Nucleus Properties Sdn Bhd (sekarang dikenali sebagai Paragon City Development Sdn Bhd) ada perhubungan dengan kerja-kerja rasmi kamu sendiri, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 165 Kanun Keseksaan.

[5] On 14 December 2018, the case against Tengku Adnan was transferred to the High Court on the application of his counsel and was then registered as Criminal Trial No WA-45–3–01 of 2019. That application was not objected to by the prosecution.

[6] On 26 December 2018, the prosecution, as the applicant herein filed a notice of motion for a transfer of the respondent's case to the High Court pursuant to ss 417(1)(e) and 418 of the Criminal Procedure Code ('the CPC')

but the application was later withdrawn on 22 January 2019.

[7] The applicant then on 14 February 2019 filed another notice of motion in the High Court pursuant to ss 417(1)(d), (1)(e), (1)(cc) and 418 of the CPC, again, to transfer the case against the respondent to the High Court.

[8] On 20 March 2019, the High Court allowed that application for transfer of the case against the respondent from the sessions court to the High Court and registered as Criminal Trial No WA-45–10–03 of 2019.

[9] Subsequently on 3 April 2019, the applicant filed a notice of motion in the High Court pursuant to s 170 of the CPC for a joint trial of the cases against the respondent and Tengku Adnan.

[10] Hence the instant application before me.

ESSENCE OF CONTENTIONS OF LITIGANTS

[11] The thrust of the argument of the applicant for a joint trial is that the charges against the two accused persons show that the key assertions contained therein, such as the date and place of the alleged offence, the purpose, the amount involved and mode of payment are all the same. All these, according to the applicant, demonstrate that the charges against the two are in relation to the same transaction, and fulfill the test for a joint trial under s 170 of the CPC.

[12] This application is contested by the respondent. The respondent anchors its resistance on two principal fronts. The first is what the learned counsel for the respondent described as a preliminary objection in that before there could be a joint trial, the relevant accused, under s 170 of the CPC must have been jointly charged, which is not the case here. The second key objection is that a joint trial against the respondent and Tengku Adnan would potentially occasion a prejudice to the respondent.

[13] I will now examine these arguments.

EVALUATION AND FINDINGS OF THIS COURT

Preliminary issue — Whether the two accused ought to have been jointly charged to justify a joint trial

[14] The respondent as an accused person argued that a joint trial can lawfully only be ordered by the court if an accused person is jointly charged with the other (or any other) who is intended to be jointly tried. This is argued to be the requirement of s 170 of the CPC which reads as follows:

> 170 When persons may be charged jointly
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> (1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, *they may be charged and tried together or separately* as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all the charges. (Emphasis added.)

[15] In my view, this premise of the preliminary objection raised by the respondent is a flawed construction of the s 170. It is simply not how s 170 is interpreted, much less how it has been applied. Even though it is true that there is no express provision in the CPC for an application for joint trial, it does not mean that if the cases are charged separately, there cannot be an order for a joint trial and that separate trials must therefore be conducted.

[16] The words 'charged and tried together', according to the respondent meant that a joint trial can only occur if the relevant accused persons have been jointly charged. First the word 'may' means the charging together is not mandatory. Secondly, it is common for accused persons to be charged separately in different courts (or the same) and for the prosecution to later apply for a joint trial.

[17] Thirdly, cases where different accused persons are charged together when the cases are registered are typically in situations where the charges allege the same crime to have been committed by reason of the common intention of the accused persons, usually in reliance on s 34 of the Penal Code. Fourthly, where the offences are technically different, like in the instant case before me, it is only procedurally correct for the different cases to be in the first place registered to be charged separately or in different courts.

[18] Therefore even if the applicant in the instant case had from the inception always intended to jointly try the respondent and Tengku Adnan, the prosecution would still have to go through the process of registering the charges separately or in different courts because the charges concerned different persons and different offences. It is only subsequently that the prosecution would seek to apply for a joint trial. That is exactly the situation now.

[19] Fifthly, it is for the party seeking a joint trial, like the prosecution before me, to establish that its case falls within any of the stated exceptions. But the fact that the accused persons are not at the first instance charged together is immaterial to any application for joint trial that may be initiated by the party seeking a joint trial.

[20] After all, it may be conceivably the case that an accused person is the party who seeks a joint trial. But he would have no say whatsoever in the prosecutorial decision to have him charged together or separately with another accused. If the argument of the respondent is correct, as accused persons for different offences are usually charged separately in the same or other courts, no such application for a joint trial by an accused person can in that situation ever succeed.

[21] The submission of the respondent that this application ought to be dismissed because there is no statute that confers jurisdiction to this court to grant the same unless there has been a joint charge preferred against both the respondent and Tengku Adnan is thus without substance, for it conveniently ignores the true construction of s 170 and the countless joint trials that had taken place despite the accused persons not originally having been jointly charged.

[22] The other related reason why this objection of the respondent is untenable is this. The respondent actually correctly submitted that joint trial is an exception to the rule that separate trial should be held for every distinct offence, as enacted in s 163 of the CPC which states as follows:

> 163 Separate charges for distinct offences
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> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in cases mentioned in Sections 164, 165, 166 and 170.

[23] In a leading case on this subject, the High Court in *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 held thus:

> At the outset it must be said that the prosecution's concern is the legality of the trial. Such concern is understandable in view of the Privy Council's decision in *Subramania Ayyar v King Emperor* 28 IA 257 and followed in *Chin Choy v Public Prosecutor* [1955] 1 MLJ 237 which held that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.
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> The question then is whether these four charges can be tried together. The general rule is that every accused person should be charged and tried separately for every distinct offence: s 163 of the CPC. This general rule, however, is subject to four exceptions, viz:
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> (i) Not more than *three offences of the same kind* committed within the space of 12 months may be tried together: s 164 of the CPC.
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> (ii) One trial for all offences committed by the same person arising out of the *same transaction*. There is no limit as to the number of charges that may be preferred against an accused person at such trial: s 165 of the CPC.

(iii) Where on the same set of facts several offences are disclosed and it is doubtful which particular offence to charge; the accused may be charged with all the offences disclosed or in the alternative for every such offence. There is no limit to the number of charges: s 166 of the CPC.

(iv) Where several accused persons commit the same offence or several offences of the same kind or different offences in the *same transaction*, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: s 170 of the CPC.

In *Lim Yean Leong v Public Prosecutor* [1940] 1 MLJ 216 it was held by the Court of Appeal that these four exceptions are cumulative and not mutually exclusive. The Privy Council came to the same decision in *Babulal Choukhani v Emperor* AIR 1938 PC 130. These authorities are fully discussed by the Court of Appeal in *Cheong Sik Kwan v Public Prosecutor* [1959] 1 MLJ 189.

[24] It is manifest from the very words of s 170 of the CPC, and as further affirmed by *Jayaraman & Ors v Public Prosecutor* that the general rule on the need for separate charges and separate trials for distinct offences is contained in s 163; and exceptions thereto may be found in any of the four specified sections, s 170 being one of them.

[25] It is therefore as clear as day that if s 170 is an exception to s 163 as correctly submitted by the respondent, it is only right for the different accused persons to be first charged separately for different offences in adherence to s 163.

[26] The contention of the respondent that a joint trial cannot be ordered because the respondent and Tengku Adnan were not charged together is totally unsustainable. This preliminary issue by the respondent is therefore rejected.

Whether the charges and the two accused persons ought to be jointly tried

[27] It is observed that the respondent did not submit much, if at all, on the issue of whether the two accused persons should be tried together under the test which is apparent from the language of s 170 itself. The essence is that a joint trial may be ordered 'When more persons than one are accused of the same offence or of different offences committed in the *same transaction*'.

[28] Thus, the crux of s 170(1) is that the offences involving the different accused persons are committed in what is essentially the same transaction. The burden however lies on the applicant who wishes to have a joint trial that a joint trial ought to be granted on the facts of the case (see *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129).

[29] The predominant test to be established by the party applying for a joint trial to the satisfaction of the court, as to whether there is a same transaction or whether a series of acts are so connected as to form one transaction, as articulated in *Amrita Lal Hazra & Ors v Emperor* [1915] 42 Cal 957, and as later applied in local jurisdiction in cases such as the above-stated *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 include primarily considerations on proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

[30] Although the court considering such application will examine whether these elements constitute same transaction under s 170, it is an important proposition of law governing s 170 that the power to order a separate or joint trial is a power exercisable by the trial court (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88), the granting or refusing of which application is entirely a matter of discretion of the trial judge.

[31] The former Federal Court in *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85 made the same observation on the true application of the guiding principle of judicial discretion where Thompson LP held instructively as follows:

> We do not dissent from the opinion of the former Court of Appeal though, of course, it has less force where a case is to be tried by a judge alone than where it is to be tried by a judge and assessors as was the case under the 1948 Regulations. Nevertheless the question of joint or separate trial of charges, within the limits of the Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case.

[32] Based on the charges preferred against the respondent and Tengku Adnan, it is quite clear that the facts underlying the transaction subject to the charges are the same. The date and location of the alleged crime, the monetary amount involved, the cheque as the payment instrument, the account holder, the approval concerning development project, are all identical. Furthermore the lists of documents submitted by the prosecution to the defence in both cases under s 51A of the CPC are the same, and it is also likely that the same witnesses will be called.

[33] The only difference between the two charges is that the respondent is accused of having given the bribe under s 16(b)(A) of the MACC Act and that Tengku Adnan, as the other accused is alleged to have received that same bribe under s 16(b)(A) of the MACC Act.

[34] In my view the test as established by case law authorities on the requirement of the presence of a same transaction, namely concerning proximity of time, unity or proximity of place, continuity of action and

continuity of purpose or design given the above-stated factual considerations, have more than clearly been made out.

[35] The four factors as discussed in *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 and much earlier in *Amrita Lal Hazra* are 'mutually exclusive and not cumulative'. In *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129 Lee Hun Hoe JC (as he then was) held as follows:

> The usual test applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However, I do not think it is necessary that all of them should be present to make the several incidents parts of the same transaction. In my view the main test is that of unity of purpose or design.

[36] In my view it certainly cannot be doubted that based on the charges — of one accused being charged for giving a bribe and another being alleged to have received that same bribe is overwhelmingly indicative of the presence of a unity of purpose and design. It probably would not get any more obvious than this.

[37] As such, the requirement that the different charges must relate to the same underlying transaction pursuant to s 170 of the CPC in order to justify a joint trial has been satisfactorily shown by the applicant to have been fulfilled.

Whether a joint trial would cause a prejudice

[38] A finding of the presence of a 'same transaction' under s 170 of the CPC however does not automatically mean that a joint trial must be ordered. This is the crux of the application before me.

[39] This is of course correct. The power of the court to order a joint trial on the basis of s 170 of the CPC is a matter of discretion of the trial court and that the discretion must be exercised judiciously having regard to whether a joint trial would occasion a prejudice or does not accord with the interest of justice.

[40] It is the contention of the respondent that a joint trial would be unfair and prejudice him and his defence. The respondent relied considerably on the decision of this court in the case of *AFM Shafiqul Hafiz v Public Prosecutor* [2019] 10 MLJ 31 and referred to among others the following passages from my judgment:

> [29] Although the court considering such application will examine these elements constituting same transaction under s 170, it is an important proposition of law governing s 170 that the power to order a separate or joint trial is a power exercisable by the trial court (see *Jayaraman & Ors v Public Prosecutor*), the granting or refusing of which application is entirely a matter of discretion of the trial judge.

...

The court must exercise its discretion judiciously

As such a mere finding that there was one same transaction should not without more result in the making of an order for a joint trial. The discretion vested in the trial judge warrants that it be exercised judicially. This necessitates further consideration, on the facts of the case, to the extent available at that early stage, on matters of potential prejudice and the interest of justice. And it is of course not lost on me that the very language of s 170 refers to the operative word 'may' in the first place.

...

[35] It may thus be stated that the overriding consideration in the exercise of discretion to consider the suitability of ordering a joint trial under s 170 of the CPC is whether a joint trial will be fair and just, and whether the accused will be prejudiced by a joint trial. Case-law authorities such as *R v Grondkowski*; *R v Malinowski* [1946] 1 All ER 559; [1946] 1 KB 369 and *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71 have established that both the interests of justice and the interests of the accused must be taken into account.

...

[37] The English Court of Criminal Appeal in *R v Grondkowski*; *R v Malinowski* [1946] 1 All ER 559; [1946] 1 KB 369 also specified that the justice of the case in an application for joint trial requires consideration of any prejudice that may be occasioned to an accused person.

[41] Thus, as affirmed by the case of *AFM Shafiqul Hafiz* a joint trial should not be ordered if it would cause prejudice to an accused. The respondent objected to the joint trial and relied on *AFM Shafiqul Hafiz* on account of two principal grounds. The first is the fact that Tengku Adnan, being an accused, would be a non-compellable witness in a joint trial of both. In other words, the respondent might not be able to call a material witness in his defence. Secondly, at the same time, is that the respondent could not examine the co accused if the latter chooses to remain silent in the event defence against both is called.

[42] In my view although the concerns raised by the respondent would not arise in a separate trial situation, this is however not a sufficient reason to show prejudice to the respondent. In the first place what is raised by the respondent — the non-compellability of a co-accused as a witness and the inability to cross examine a co accused who is called to enter defence but chooses to remain silent — would be a natural consequence of any joint trial.

[43] And I should add that although the respondent fashioned the issue of the non-compellability of the co-accused in the context of the defence stage, for completeness, the argument is no less relevant at the prosecution stage. This is because if the accused are separately tried, the prosecution would have to call Tengku Adnan as a material witness to unfold the narrative of its case (see the Supreme Court decision in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ

433), in which context, the respondent as the accused would have the right to cross-examine Tengku Adnan as a prosecution witness.

[44] If therefore the argument of the respondent, without more, is accepted, then all cases of joint trial could be vitiated by reason of these two concerns which are the requirements of the law in the CPC and the Evidence Act 1950 anyway. This is because all joint trials would result in the same situations highlighted by the respondent.

[45] I have even cautioned against an accused taking this stance in *AFM Shafiqul Hafiz* in the following terms:

> [49] I must highlight that this finding does not mean that in all cases where there are two or more accused persons, a joint trial would necessarily translate into a miscarriage of justice as one accused cannot cross-examine the other accused during the prosecution stage. Not at all. The key is that the judicial discretion in considering a joint trial application must be carefully exercised to consider the charges against the accused persons, availability of defences, and how they are involved in the offences and the relationship of the charges between one and the others.

[46] And reliance cannot be made, like is done by the respondent, on the case of *AFM Shafiqul Hafiz* because the situation in that case is different.

[47] A joint trial would mean that the co-accused cannot be compelled to testify either for the prosecution or the other accused and the co-accused could also choose to remain silent when asked to enter his defence. The accused in the case of *AFM Shafiqul Hafiz* was able to show that the prosecution would have to call the other accused to testify on the communication of inside information, since there was no document given under s 51A which could show that. All these considerations show possible prejudice in *AFM Shafiqul Hafiz* but they are absent in the instant application before me.

[48] In that case, first, the accused was charged with insider dealing and the other accused of communicating the inside information to the first mentioned accused. Secondly, the affidavit of the prosecution in that suit also confirmed that the accused intended to call the co-accused for his defence. Thirdly it is especially pertinent to note that a specific statutory defence or the parity of information defence under s 198 of the Capital Markets and Services Act 2007 ('the CMSA') was available for the accused. I will elaborate.

[49] The respondent asserted that there was no difference in the position of the two accused in *AFM Shafiqul Hafiz* when compared with the respondent and Tengku Adnan in the instant case vis a vis the respective charges. I think this is an inaccurate argument.

[50] In *AFM Shafiqul Hafiz* where the charges were under the CMSA one was charged for engaging in insider trading of securities whilst the other was prosecuted for communicating inside information to the first mentioned which led to the said insider trading.

[51] That presented a different factual situation from the instant case where the respondent is charged for the giving of a bribe to Tengku Adnan who is also prosecuted precisely for receiving that very bribe. It was not that another accused was the other party to the insider trade for which the accused was also charged.

[52] Secondly, the very nature of the crime and how the charges are intended to be proven are especially important. It is quite well known that prosecution of securities laws offences, particularly market-misconduct related like insider trading, necessitating proof of the elements of among others 'inside information', 'insider' and 'insider trades' would generally be lengthy and prolonged and is generally difficult to prove.

[53] And this would especially be the case when the charge involves the allegation that inside information has been communicated without reliance being made by the prosecution on any documents setting out the record of the contents or the fact of communication between the relevant parties.

[54] That was the situation in *AFM Shafiqul Hafiz* based on the list of documents supplied to the accused before commencement of trial under s 51A of the CPC. And the fact that the accused required to examine the co accused charged with communicating the inside information to the former was specifically highlighted in an affidavit affirmed by the accused in support of his revision application against the order for joint trial made by the sessions court.

[55] This is not present in the instant case before me. No averments were made by the respondent to state the reasons for the need to call Tengku Adnan as his witness. The respondent had also not taken the early opportunity to present its defence statement to the applicant under s 62 of the MACC Act to emphasise further the nature of his argument on the need to examine Tengku Adnan.

[56] I should add that it is not the situation that the respondent was already obliged at the stage of the hearing to do so pending confirmation that there was by then already full compliance with s 51A of the CPC by the applicant.

[57] Further, as mentioned earlier, the accused's insistence on the need to examine the other co-accused on the communication (of the inside information) allegedly made by the latter to the former with a view to

establishing his defence is of some substance as the CMSA itself recognises the somewhat special position of the offences of dealing in and communicating inside information in the enactment of the parity of information defence in s 198 of the CMSA.

[58] I can do no better than reproducing the relevant passages which discussed this point in *AFM Shafiqul Hafiz* in the following fashion:

> [65] In the instant case before me, clearly the applicant intends to call HS as his witness as averred in the former's affidavit which stated as such, including affirming that the latter's evidence could avail the applicant to his defence against the charge. In particular it was stated that HS would be the only witness who could testify on matters set out in s 198(2)(b) of the CMSA which would provide the applicant a complete defence against the charge. It is imperative that the provision of s 198 be stated. It reads:
>
> 198 Parity of information defence
>
> (1) A person does not contravene subsection 188(2) if —
>
> (a) the securities that are the subject of the transaction or agreement or the action of procuring a transaction or an agreement are not securities which are permitted on the stock market of a stock exchange;
>
> (b) the court is satisfied that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement; and
>
> (c) that person acquires or disposes of such securities on such terms and in such circumstances that —
>
> (i) he does not obtain any gain or avoid any loss, including an unrealised gain or unrealised avoidance of loss in price or value, of the securities, as the case may be, for himself or any other person by reason of the effect that the information is likely to have when it becomes generally available; and
>
> (ii) the purpose of the acquisition or disposal of the securities does not include any purpose of securing a gain or avoiding a loss, as the case may be, for himself or any other person by reason of the effect that the information is likely to have when it becomes generally available.
>
> (2) *In a prosecution for an offence under subsection 188(3) where the person communicated information or caused information to be communicated to another person, it shall be a defence —*
>
> (a) *if the court is satisfied that the information came into the possession of the person so communicating the information solely as a result of it being made known in a manner likely to make it generally available pursuant to section 184; or*

(b) *if the court is satisfied that the other party knew of, or ought reasonably to have known, the information before the information was communicated.* (Emphasis added.)

[66] Given this statutory defence, and the position of HS as potentially the only witness who could give evidence on matters specified in the charge against the applicant, including in particular for the applicant to establish that he could not have reasonably known that HS would tend to acquire the impugned shares in reliance of the alleged communication of inside information to HS by the applicant, it is patently clear that the ability of the applicant to call HS as a witness is of crucial importance to his defence.

[67] That however will never happen in the event HS chooses to remain silent under s 173(ha) of the CPC — not in his own trial — but in a joint trial scenario as presently ordered by the sessions court.

[68] In such an event, it would seem inevitable if not an absolute certainty that the applicant would have no recourse whatsoever so compel HS to testify. Nor could the applicant resort to any other avenue to enable him to invoke his defence under s 198(2) of the CMSA.

[59] The respondent cannot rely on this argument as there is no similar statutory defence that could be invoked in respect of the charges in the instant case.

CONCLUSION

[60] In conclusion, in my judgment, in view of the foregoing reasons, I found that the applicant has successfully shown that the charges against the respondent and Tengku Adnan arose from the same transaction under s 170 of the CPC to justify a joint trial of the two accused persons and that it has not been demonstrated that such a joint trial would occasion a prejudice to the respondent. Accordingly this application was allowed.

Application allowed.

Reported by Mohd Kamarul Anwar